

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF OREGON

3 UNITED STATES OF AMERICA,)
4 Plaintiff,) No. 3:10-cr-318-MO-3
5 v.)
6 GONZALO VARGAS-TORRES,) June 17, 2013
7 Defendant.) Portland, Oregon
8 _____)

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15 **Oral Argument/Sentencing Hearing**

16 TRANSCRIPT OF PROCEEDINGS

17 BEFORE THE HONORABLE MICHAEL W. MOSMAN

18 UNITED STATES DISTRICT COURT JUDGE
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APPEARANCES

FOR THE PLAINTIFF: Ms. Kathleen Louise Bickers
United States Attorney's Office
1000 S.W. Third Avenue, Suite 600
Portland, OR 97204

FOR THE DEFENDANT: Ms. Lisa J. Ludwig
Attorney at Law
811 S.W. Naito Parkway, Suite 500
Portland, OR 97204

COURT REPORTER: Bonita J. Shumway, CSR, RMR, CRR
United States District Courthouse
1000 S.W. Third Ave., Room 301
Portland, OR 97204
(503) 326-8188

SPANISH INTERPRETER: Ms. Tina Machuca

U.S. PROBATION: Mr. Adam Jacobson

(P R O C E E D I N G S)

MS. BICKERS: Good afternoon, Your Honor.

Kathleen Bickers, appearing on behalf of the Government.

This is the matter of the United States v. Gonzalo

Vargas-Torres, CR-10-318-03-MO. The defendant is before the

Court in the custody of the U.S. Marshal. He's being

assisted by the interpreter, Tina Machuca, whose oath is on

file with the Court, as well as his attorney, Lisa Ludwig.

This is the time and place set for sentencing, pursuant to the defendant's plea of guilty to three counts in the superseding indictment.

Also, at the same time, we have scheduled before the sentencing the defendant's motion to obtain a new attorney.

And then there's another matter which has been pending out of Iowa, which under the terms of the plea agreement, the defendant was to enter a plea of guilty pursuant to a Rule 20 proceeding, and we need to address what's going to happen with that matter before we conclude today.

THE COURT: Thank you.

Mr. Vargas-Torres, you have made two requests of me in advance of your sentencing. One is to withdraw your guilty plea; and related to that, I guess, is your effort to replace your attorney with a different attorney.

1 Let me tell you how this would play out in the
2 future. You're at a fork in the road, and the first fork in
3 the road is that I deny those motions and we proceed to
4 sentencing, and you receive a lengthy sentence, to be sure,
5 a 180-month sentence, which happens to be the lowest
6 possible sentence that someone in your position can
7 receive -- given that the sentences you get on each of the
8 three counts are mandatory, I have no discretion to do
9 anything lower -- or, I could let you have a new attorney
10 and withdraw your pleas. Certainly you have -- well, if I
11 did that, the Government would have the right to rescind its
12 plea agreement with you, and there's only one direction your
13 sentencing would go in any new plea agreement, and that's
14 up. So they'll never make you a better offer than the one
15 you have now. It's likely you'll get, in fact, a worse
16 offer.

17 Of course, prior to your guilty plea, you had
18 every right to go to trial and attempt to have your sentence
19 be nothing by winning at trial. Several good lawyers,
20 including Ms. Ludwig, have advised you not to do that, and
21 eventually you accepted that advice and pled guilty. That
22 guilty plea is deemed to be final unless you give me the
23 sort of reasons that are recognized in law for changing now,
24 withdrawing your guilty plea, and you have not done that.

25 So I have in front of me your motion to withdraw

1 your guilty plea. I deny that motion. I'm not going to
2 allow you to withdraw your guilty plea.

3 The next motion I have in front of me is your
4 motion to substitute in a new lawyer. You've had several
5 lawyers. Ms. Ludwig has negotiated for you the lowest
6 possible sentence that can be negotiated. So I deny your
7 request for a new lawyer. We will proceed with sentencing.
8 I've received your sentencing memorandum in this case.

9 Ms. Bickers, I want to be sure, the matter from
10 Iowa doesn't need to happen before sentencing in this
11 matter, does it?

12 MS. BICKERS: No.

13 THE COURT: So I know you and Ms. Ludwig have not
14 been communicating recently. I'm going to take a
15 five-minute break or so for the two of you to talk about
16 whether there's anything further that you want to say. I do
17 intend to accept the plea agreement; that is, although I
18 could give you a sentence longer than 180 months, I intend
19 at sentencing to give you the sentence recommended by the --
20 by your attorney and the attorney for the United States in
21 this case. Any other course, sir, I'm confident would be
22 only to your detriment, to your harm, and I don't intend to
23 allow that to happen.

24 So I'll come back on the bench in about five
25 minutes.

1 THE CLERK: This court is in recess.

2 (A recess is then taken.)

3 THE COURT: Ms. Ludwig, is there anything further
4 you wish to say on behalf of your client before I pass
5 sentence?

6 MS. LUDWIG: I have two intermediate concerns,
7 Judge. One is that earlier it wasn't clear to me that you
8 were addressing both Mr. Vargas-Torres's motion to remove me
9 and get a new attorney and my totally separate motion to
10 withdraw, based on his wish for me to file that motion.

11 THE COURT: I deem that as two sides of the same
12 coin.

13 MS. LUDWIG: I just wanted it to be clear for the
14 record, Your Honor.

15 The second thing is that during the break, I
16 attempted to discuss with Mr. Vargas-Torres his wishes with
17 regard to the Iowa matter. I explained to him that if he
18 wishes to negotiate with the Government, as we had
19 originally planned, to settle his Iowa case, that that was
20 still possible, that he would remain here, but if he doesn't
21 wish to do that, Iowa will take him when he's finished that
22 sentence.

23 I tried to obtain an answer from Mr. Vargas-Torres
24 about which of those two courses of action he intended to
25 pursue, but I wasn't able to do that.

1 THE COURT: All right.

2 Thank you. Does your client wish to say anything
3 before I pass sentence?

4 (All answers of the defendant are through the
5 interpreter.)

6 THE DEFENDANT: Okay. May I read a letter that I
7 have here?

8 THE COURT: Yes.

9 THE DEFENDANT: First, if you're going to sentence
10 me, I can be sentenced, but I would like this to be taken
11 into consideration. Is that fine?

12 THE COURT: You want to make it part of the record
13 or read it?

14 THE DEFENDANT: I'd like to read it, right.

15 THE COURT: That's fine.

16 THE INTERPRETER: Your Honor, may the interpreter
17 request that we take turns?

18 THE COURT: Do you want the interpreter to just
19 read it to me in English?

20 THE DEFENDANT: It's in Spanish. Can you read it?
21 I can read it if you'd like.

22 THE COURT: All right. Then just read one
23 sentence at a time, and then the interpreter will interpret.

24 THE DEFENDANT: Your Honor, first, thank you for
25 having considered my petition regarding retracting my plea,

1 my guilty plea. And I would like to ask you please for us
2 to finish -- for us to finish up with my sentence as quickly
3 as possible, since I've already been a prisoner for more
4 than 31 months in the county jail, and it's very difficult
5 for me to continue staying there any longer.

6 I have some of the following points or mistakes
7 regarding my attorney, and if you would allow me to, I would
8 like me to explain them.

9 THE COURT: I would like you not to read those,
10 since they won't affect your sentence, but I will have
11 Ms. Stephens make your letter an exhibit, and it will be in
12 the court file, and I will read your letter. In fact, if
13 you want me to, I'll read it right now before I pass
14 sentence. I can do that.

15 MS. LUDWIG: It is in Spanish, Your Honor.

16 THE COURT: That's fine. I read Spanish.

17 THE DEFENDANT: (Handing document to clerk.)

18 THE COURT: (Reading letter.)

19 All right. Thank you, sir. I have read your
20 letter.

21 THE DEFENDANT: Okay.

22 THE COURT: There are parts of that letter that
23 just had to do with what the sentence ought to be in this
24 case, but the major part of it is what you spoke of in your
25 request to withdraw your guilty plea, that you believe that

1 you should not be held responsible for the firearms in this
2 case, for example, and I know that's what you're now saying.
3 As I said, I'm not going to grant your request to withdraw
4 your guilty plea in this case.

5 I've read the letter in part because I understand
6 it to be your request to put on the record why you wanted to
7 withdraw your guilty plea.

8 Is there anything further you wish to say about
9 your sentence before I pass sentence in this case?

10 THE DEFENDANT: Just to consider my charges
11 regarding what I, myself, did, and if you would like to
12 impose a sentence today that do it, to do it regarding more
13 or less -- regarding what I myself was responsible for.

14 THE COURT: All right. Thank you.

15 I have reviewed the presentence report in this
16 case. I view it as an accurate statement of the guidelines.
17 Those guidelines, at least according to the United States
18 Probation Office, recommend a total sentence of 295 months,
19 which is just about 25 years in prison. The parties jointly
20 recommend a sentence just about ten years less than that, a
21 15-year sentence in this case.

22 And so I, although I think the presentence report
23 accurately states the guidelines, I do not intend to follow
24 them. I intend to sentence at the lower sentence that your
25 attorney negotiated and that the parties are jointly

1 recommending, for reasons reflected in the defendant's
2 personal history and the characteristics of this defendant
3 and the nature of the case.

4 The defendant is committed on Count 1 -- Let me
5 make sure I get these right. Count 1 is the initial
6 ten-year minimum mandatory sentence; is that right,
7 Ms. Bickers?

8 MS. BICKERS: That's correct, Your Honor.

9 THE COURT: So the defendant is committed to the
10 Bureau of Prisons for confinement for a period of 120 months
11 on Count 1, the minimum mandatory sentence in this case.
12 Upon release, the defendant shall serve a five-year term of
13 supervised release, subject to the standard conditions of
14 supervision adopted by this Court, with the following
15 special conditions: if deported, you'll not reenter the
16 U.S. without reapplying to and receiving approval from the
17 Department of Homeland Security, without prior notice to the
18 U.S. Attorney and the U.S. Probation Office for the District
19 of Oregon. You will not commit any new federal, state or
20 local crimes. Two, you'll cooperate in the collection of
21 DNA.

22 As to Count 12, the defendant is committed to the
23 Bureau of Prisons for confinement for a period of 120
24 months, said sentence to be served concurrently with the
25 sentence imposed in Count 1.

1 MS. BICKERS: Your Honor, that sentence is
2 mandatory consecutive.

3 THE COURT: You're sure that's not Count 2?

4 MS. BICKERS: Oh, I'm sorry, you're already on
5 Count 2?

6 THE COURT: I did Count 12 before Count 2.

7 MS. BICKERS: I didn't hear that. Thank you, Your
8 Honor.

9 THE COURT: So that's the second count. First
10 Count 1, then Count 12.

11 The third count I'm imposing a sentence on is
12 Count 2. The defendant is committed to the Bureau of
13 Prisons for confinement for a period of 60 months, said
14 sentence to be served consecutive to the sentences imposed
15 in Counts 1 and 12.

16 I'm not ordering any fine. There is a fee
17 assessment of \$100 on each count, for a total of \$300 due
18 immediately. No restitution is owed either.

19 You have waived some or all of your appeal rights
20 as part of the plea agreement in this case. Such waivers
21 are generally enforceable. But if your plea agreement -- if
22 you think your plea agreement allows you to appeal, you must
23 file a notice of appeal within 14 days of the entry of
24 judgment. If you can't pay the cost of an appeal, you can
25 ask for permission to appeal without paying the cost. If

1 you request, the clerk of the court will prepare and file a
2 notice of appeal on your behalf.

3 Now, in this case, I happen to know that you do
4 want to appeal, so let's talk about that. First of all,
5 that just means that there's some paperwork that you have to
6 do to make your appeal possible. I'm not asking you to
7 understand that perfectly, but do you get the idea that
8 there's some steps you have to take to appeal?

9 THE DEFENDANT: Yes.

10 THE COURT: Ms. Ludwig has done many appeals. I'm
11 not giving you a new lawyer. Right now you're not talking
12 to her. That's pretty much a rock solid guarantee that if
13 you keep that up, you'll lose your appeal. So are you ready
14 to start working with her on your appeal?

15 THE DEFENDANT: Yes.

16 THE COURT: Do you want her -- do you want to
17 authorize her here in court to file a notice of appeal on
18 your behalf?

19 THE DEFENDANT: Yes.

20 THE COURT: All right. That will get you started,
21 and then she knows what issues to raise. And she'll raise
22 them about the guilty plea, among others.

23 The one thing she will not be able to handle on
24 appeal is any question about her own competence, but she'll
25 explain to you how that gets challenged later. You will

1 have an opportunity, if you choose to use it, to raise that
2 argument also in a different way. So we'll expect the
3 notice of appeal to come from Ms. Ludwig in the time period.

4 The defendant is currently in custody, not viewed
5 as suitable for voluntary surrender.

6 Are there any pending charges requiring dismissal?

7 MS. BICKERS: Not in this indictment. And all the
8 underlying indictments that have predated this one we would
9 move to dismiss against this defendant only.

10 THE COURT: Granted.

11 Anything further from the defense by way of
12 potential designation, where to serve his time?

13 MS. LUDWIG: Your Honor, because it's unclear
14 whether Mr. Vargas-Torres wants to take it to Iowa or remain
15 here to try to complete the negotiations with the Government
16 here, it's hard to --

17 THE COURT: That's a good point.

18 Let me ask you something about that. We have this
19 other charge in Iowa, and the way things work here is that
20 Iowa has its own case, and I'm not in charge of that case.
21 You can negotiate a plea here of the Iowa charges and a
22 resolution of them, but you can't go to trial here in Oregon
23 on those Iowa charges. If you want to go to trial, you have
24 to go back to Iowa. That's where they'll take you in
25 custody, back to Iowa.

1 So what will likely happen is if you decide to go
2 back to Iowa and face these charges and contest them in
3 trial -- which you're perfectly free to do -- it's likely
4 you'll be detained at least for a while somewhere near Iowa.

5 Do you know where Iowa is?

6 THE DEFENDANT: Yes.

7 THE COURT: All right. And so we need to know --
8 on the other hand, you can have Ms. Ludwig try to negotiate
9 that here. If she's successful, then you can be somewhere
10 near -- as close to here as possible, I guess, while that's
11 happening. I'm not saying you'll be at Sheridan, but you
12 won't go to Iowa, let's put it that way.

13 Do you want Ms. Ludwig to start negotiating with
14 Ms. Bickers the Iowa case, or would you prefer to go back to
15 Iowa and get a lawyer in Iowa and deal with it all in the
16 state of Iowa?

17 THE DEFENDANT: I'm a little bit confused. I
18 thought that both cases were being arranged right now.

19 THE COURT: I can understand your confusion.
20 That's not what has happened. That's what Ms. Ludwig says
21 she wants to try to do on your behalf here, but it hasn't
22 fully happened yet. So you have to decide whether you want
23 her to do that now, here -- not this moment, but in the next
24 couple weeks here, or if you'd prefer to go to Iowa and have
25 everything happen there with a new lawyer and a new

1 prosecutor in Iowa. I'm going to let you decide which of
2 those two you'd like to do.

3 THE DEFENDANT: I'd like the arrangements to be
4 made here instead.

5 THE COURT: I just want you to be clear that
6 Ms. Ludwig would then start negotiating on your behalf. I
7 don't know where they're going to send you. You're going to
8 start serving this sentence while she tries to work out the
9 Iowa case. I don't know where they're going to send you,
10 I'm just saying that it just means you won't be sent back to
11 Iowa.

12 I'll authorize you then to start. So I assume,
13 given his contacts in this area, you'd like him to be --
14 would you like me to make a recommendation for as close to
15 Oregon as possible or somewhere else?

16 MS. LUDWIG: In the Northwest, Your Honor, because
17 his family is in Seattle. So I'm just asking for a
18 recommendation in Oregon and Washington, if possible.

19 THE COURT: Given defendant's ties, relatively
20 longstanding, many years of ties to this area, including the
21 Seattle area, I am urging the Bureau of Prisons to designate
22 him to a prison as close to Seattle as possible, either
23 Oregon or Washington, so that they could by car be able to
24 arrange a trip to visit him during this lengthy prison
25 sentence.

1 In the meantime, you'll negotiate the Iowa matter
2 and you'll let me know if you need anything further from
3 this Court on that.

4 MS. LUDWIG: I will, Your Honor.

5 MS. BICKERS: Your Honor, I believe that you made
6 this clear, but just so that the defendant is clear about
7 this, the defendant has waived appeal in this matter. You
8 have given him information about, despite that waiver, if he
9 chooses to pursue an appeal, you've addressed that regarding
10 a notice of appeal must be filed.

11 In addition, we will need approximately 30 days
12 for further proceedings to see if we can negotiate a Rule 20
13 here. We put the brakes on that until we saw what was
14 happening with his motion to withdraw or his motion to
15 withdraw his plea and his motion for substitution of
16 attorneys. But I will tell the Court this, and I will tell
17 Ms. Ludwig this, that when I notified the Iowa authorities
18 that the defendant intends to appeal or will be filing
19 appeal of this Oregon matter, I do not believe that they
20 will agree to a concurrent sentence, as discussed during
21 this prior proceeding, when we reached the plea agreement in
22 this case. So we'll have that discussion further, but I
23 want to make sure the defendant knew that I was telling the
24 Court that, and so it won't be a surprise to him when his
25 attorney tells him that.

1 THE COURT: Thank you for putting that on the
2 record.

3 So you and Ms. Ludwig will have further
4 conversations. Keep in mind simply because your attorney
5 gives you hard choices to make doesn't mean she's a bad
6 attorney. You just have hard choices to make. Some of
7 those choices can't be made better by any attorney on earth.
8 So work with her. She's a good attorney. She'll get you
9 the best possible arrangement you can make. Don't ignore
10 her. It just makes your whole life more difficult.

11 And then we'll just see where that goes. It will
12 be up to the marshals what they do, but it sounds like we
13 may have within 30 days or so a proceeding with this
14 defendant. At least that's a realistic enough possibility
15 that he probably shouldn't be sent a long ways away.

16 Anything further?

17 MS. BICKERS: No, Your Honor.

18 THE COURT: Thank you. We'll be in recess.

19 THE PROBATION OFFICER: Your Honor, if I may, one
20 point of clarification on the sentence, if in case I missed
21 it.

22 THE COURT: Yes.

23 THE PROBATION OFFICER: Was the Court also
24 imposing a concurrent five-year supervised release term on
25 Counts 2 and 12 with the same conditions?

1 THE COURT: Yes. I'm glad you raised that. I
2 neglected to say that.

3 THE PROBATION OFFICER: Thank you, Your Honor.

4 MS. BICKERS: Your Honor, one thing I'm concerned
5 about. If we don't pick a further proceedings date under
6 the Iowa case number, the defendant will be transferred
7 potentially out of the jurisdiction and we might be in a
8 situation where it would be difficult to get him back. I
9 was wondering if we could have a status with this Court
10 under the Iowa case number, if counsel agrees.

11 MS. LUDWIG: I agree with that.

12 THE COURT: Yes. About how far out?

13 MS. BICKERS: About 30 days, Your Honor. It
14 requires paperwork to be approved by the U.S. attorney here
15 and the U.S. attorney in Iowa, and it's not just handled by
16 assistants. It's actually the U.S. attorneys who have to
17 approve it.

18 THE COURT: I know how hard it is to find those
19 U.S. attorneys in the office. Do your best.

20 MS. BICKERS: All right.

21 THE COURT: Ms. Stephens?

22 THE CLERK: The court is available Monday,
23 July 29th, at 11:00 a.m.

24 MS. BICKERS: I have a trial in Judge Simon's
25 court that is starting on that day.

1 THE CLERK: The court is available Thursday,
2 July 25th, at 11:30.

3 MS. BICKERS: I am available.

4 MS. LUDWIG: I'm sorry, I'm gone on that day. I
5 have a couple things out of town.

6 THE CLERK: Clarification for the clerk. Are you
7 not available that week?

8 MS. LUDWIG: No, I'm gone the 25th and 26th. I'm
9 available the 22nd second and 23rd.

10 THE CLERK: The court is available Monday,
11 July 22nd, at 10:00.

12 MS. LUDWIG: That's fine.

13 MS. BICKERS: I'm available.

14 Thank you, Your Honor.

15 THE COURT: We'll be in recess.

16 THE CLERK: Court is in recess.

17 (Proceedings concluded.)
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I certify, by signing below, that the foregoing is a correct transcript of the record of proceedings in the above-entitled cause. A transcript without an original signature or conformed signature is not certified.

/s/Bonita J. Shumway

8/10/2013

BONITA J. SHUMWAY, CSR, RMR, CRR
Official Court Reporter

DATE